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Supreme Court of the United States

OCTOBER TERM—1951

No. 303

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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On November 5, 1951, this Court, by its order dated on that day, denied the petition herein for certiorari.

Pursuant to Rule 33 of the rules of this Court, the petitioner now applies for a rehearing of his petition for certiorari, based on other substantial grounds available to petitioner, although not previously presented.

POINT I

In a prosecution by the United States against petitioner, the arbitrary refusal of an assistant United States Attorney, with the approval of the trial court, to produce a document in the possession of the assistant United States Attorney, on the sole ground that he was not authorized to give out any official F. B. I. reports, was error, requiring the reversal of the judgment of conviction.

The record clearly shows that the assistant United States Attorney declined to produce, when called upon to

do so by the defense, an official F. B. I. report. He stated (169):

> "I decline. I am not authorized to give out any official FBI reports, your Honor."

In *United States ex rel. Touhy* v. *Ragen, et al.* (340 U. S. 462, 467; 71 S. Ct. 416, 419; *not heretofore cited by petitioner in his brief for certiorari herein*), this Court, by Mr. Justice Reed, wrote as follows:

> "We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers. *Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States* or with the right of a custodian of government papers to refuse to produce them on the ground that they are state secrets or that they would disclose the names of informants.*" (Emphasis ours.)

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* Cf. *United States* v. *Andolschek et al.*, 2 Cir., 142 F. 2d 503.

There was no assertion by the assistant that any "state secrets" were involved or that it "would disclose the names of informants".

It was solely an arbitrary refusal, evidently based—although he did not so allege—upon Order No. 3229 of the Attorney General, as the recital of facts in the *Ragen* case, *supra,* would indicate.

This Court in upholding the refusal of an F. B. I. agent, a subordinate of the Attorney General, to produce a document in his possession, was careful, however, to point out that the *Ragen* case did not involve a prosecution by the United States.

In the case at bar, *there is involved* a prosecution by the United States against this petitioner.

The question herein presented is of fundamental importance in the administration of the criminal law in the federal courts.

Implicit in the holding of this Court in the *Ragen* case is the intimation that serious consideration would be given to the question herein presented, involving, as it does, the refusal of the sovereign power to produce a document, even for the Court's inspection, when it seeks to imprison a defendant for fifteen years.

The materiality of the F. B. I. report and the seriousness of the error in the prosecution's refusal to produce the report, and the Court's refusal to direct its production, are fully shown on page 39 of petitioner's brief supporting the petition for certiorari.

Conclusion

Petitioner, therefore, respectfully urges the granting of a rehearing, the vacating of the order denying certiorari, and, upon such rehearing, the granting to the petitioner of a writ of certiorari directed to the Court of Appeals for the Second Circuit.

Respectfully submitted,

PETER L. F. SABBATINO,
Attorney for Petitioner.

I, PETER L. F. SABBATINO, attorney for the petitioner above named, do hereby state and certify, pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, that the foregoing petition for rehearing is presented in good faith and not for any purpose of delay, and I further certify that the said petition is restricted to the grounds specified in said Rule 33 as amended.

November 15, 1951.

PETER L. F. SABBATINO,
Attorney for Petitioner.